IN THE

Supreme Court of The United States

No. 1040

NORFOLK MONUMENT COMPANY, INC.,
Petitioner,

v.

WOODLAWN MEMORIAL GARDENS, INCORPORATED,
ROSEWOOD MEMORIAL PARK, INCORPORATED,
GREENLAWN CEMETERY PARK CORPORATION,
PRINCESS ANNE MEMORIAL PARK, INCORPORATED,
ROOSEVELT MEMORIAL PARK AND CEMETERY CORPORATION,
JAS. H. MATTHEWS & CO. OF VIRGINIA, and
JAS. H. MATTHEWS & CO.,
Respondents.

BRIEF OF WOODLAWN MEMORIAL GARDENS, INCORPORATED IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

QUESTIONS PRESENTED

The only question presented by the petition for a writ of certiorari is whether the respondents' motions for summary judgment should have been granted.

STATEMENT OF THE CASE

Certiorari is sought by the petitioner, plaintiff below, to review the judgment of the Court of Appeals of the Fourth Circuit in affirming the action of the United States District Court for the Eastern District of Virginia in granting the respondents' motions for summary judgment.

The facts of the case have been stated in the majority opinion of the Court of Appeals for the Fourth Circuit which appears as Appendix A in the petitioner's brief, and in the memorandum opinion of the United States District Court which appears as Appendix D thereto.

ARGUMENT

After the petitioner had completed its pretrial discovery and so advised the District Court, Woodlawn and the other respondents moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure (28 U.S.C.). All the evidence was carefully examined and analyzed by the Court and it found no genuine issue of material fact to submit to a jury. Indeed, as stated in the Court's memorandum, " * * * (T)here is no evidence of conspiracy at all and the plaintiff has said he could produce nothing more." The respondents' motions were granted and the petitioner appealed. The Fourth Circuit Court of Appeals again reviewed the evidence and affirmed the judgment of the District Court.

The petitioner now asks a third court to review its case, claiming the lower courts' decisions conflict with those of this Court. It quotes passages from *Poller* v.

Columbia Broadcasting System, Inc., 368 U.S. 464, 82 S. Ct. 486, 7 L.Ed. 2d 458; *Interstate Circuit* v. *United States,* 306 U.S. 208, 59 S.Ct. 467, 83 L.Ed. 610; *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons,* 340 U.S. 211, 71 S. Ct. 259, 95 L.Ed. 219, and *Eastern States Retail Lumber Dealers' Ass'n* v. *U.S.,* 234 U.S. 600, 34 S. Ct. 951, 58 L.Ed. 1490, to the effect that direct proof of conspiracy is unnecessary and that summary judgment should not be granted in doubtful cases. A review of the decisions quoted from shows that sufficient evidence was adduced in each case to support an inference of conspiracy. Here the record is completely devoid of evidence of conspiracy, and to put the respondents to trial would run full face into the intent and purpose of Rule 56.

Essentially what the petitioner is asking this Court to do is to write Rule 56 off the books and permit it to go to trial upon merely the allegations in its bill of complaint and the affidavits in opposition to the motions for summary judgment. It makes the same argument, in effect, as that considered by this Court in *First National Bank of Arizona* v. *Cities Service Co.,* 391 U.S. 253, 88 S. Ct. 1575, ... L.Ed. 2d ..... (1968), in which the plaintiff contended that in an antitrust case the burden of proof of non-participation in the alleged conspiracy is on the defendant, and that the lower court erred in granting summary judgment. In rejecting this contention the Court said (at 88 S. Ct. 1593):

> "Essentially all that the lower courts held in this case was that Rule 56(e) placed upon Waldron the burden of producing evidence of the conspiracy he alleged only after respondent Cities Service conclusively showed that the facts upon

which he relied to support his allegations were not susceptible of the interpretation which he sought to give them. That holding was correct. To the extent that petitioner's burden-of-proof argument can be interpreted to suggest that Rule 56(e) should, in effect, be read out of antitrust cases and permit plaintiffs to get to a jury on the basis of the allegations in their complaints, coupled with the hope that something can be developed at trial in the way of evidence to support these allegations, we decline to accept it. While we recognize the importance of preserving litigants' rights to a trial on their claims, we are not prepared to extend these rights to the point of requiring that anyone who files an antitrust complaint setting forth a valid cause of action be entitled to a full-dress trial notwithstanding the absence of any significant probative evidence tending to support the complaint."

All the evidence adduced in some nine months of discovery proceedings, and all the contentions made in the petitioner's brief have been carefully considered by the District Court and the Fourth Circuit Court of Appeals. Neither court found any significant probative evidence tending to support the complaint. The petitioner's president advised the District Court that it had no other evidence of conspiracy. Its sole hope of success is apparently based upon the possibility that something favorable will develop at a trial on the merits. Rule 56 was adopted for the express purpose of disposing summarily of cases based upon hopes rather than facts.

There is no conflict between the decision of the Fourth Circuit Court of Appeals in this case and the decisions of this Court. The cases cited in the petitioner's brief do not support its position, and the petitioner has not brought itself within the purview of Supreme Court Rule 19 (28 U.S.C.). While review on certiorari is discretionary with the Court, writs are ordinarily granted only when there are special and important reasons therefor. There is nothing special or important in this suit, and even if it went to trial it would be susceptible to a motion for a directed verdict pursuant to Rule 50, F.R.C.P. (28 U.S.C.), at the conclusion of the plaintiff's case.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the writ of certiorari requested should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon the following by depositing a copy in the United States mail with first class postage annexed to the envelope addressed to each counsel of record at his office address:

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on the 11th day of April, 1969.

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